

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASTE ACTION PROJECT,)	
)	Civil Action No. C12-1870RSL
Plaintiff,)	
v.)	ORDER REGARDING CROSS-
)	MOTIONS FOR SUMMARY
DRAPER VALLEY HOLDINGS LLC,)	JUDGMENT
d/b/a DRAPER VALLEY FARMS,)	
)	
Defendant,)	
_____)	

This matter comes before the Court on “Plaintiff’s Motion for Partial Summary Judgment” (Dkt. # 41) and “Defendant Draper Valley’s Motion for Summary Judgment” (Dkt. # 49). Having reviewed the memoranda, declarations, and exhibits submitted by the parties, the Court finds as follows:

BACKGROUND

This case was brought by a non-profit environmental and human health organization, Waste Action Project, against Draper Valley Holdings, LLC, for alleged violations of the Federal Water Pollution Control Act (“Clean Water Act” or “Act”), 33 U.S.C. § 1365. Plaintiff alleges that defendant exceeded the limitations imposed by its

1 state waste discharge permit and failed to apply all known, available, and reasonable
 2 methods of treatment and control (“AKART”) to its effluent in violation of the Act.
 3 Defendant does not deny that it violated certain numeric effluent limitations throughout
 4 the limitations period, but argues that plaintiff lacks standing to pursue this citizen’s suit
 5 and denies that it violated the permit’s AKART requirement. Defendant also challenges
 6 the adequacy of the pre-suit notice provided pursuant to 33 U.S.C. § 1365(b)(1)(A).
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8 **A. The Clean Water Act**

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 10 Section 301(a) of the Clean Water Act prohibits the discharge of pollutants
 11 into navigable waters unless in compliance with the Act. 33 U.S.C. § 1311(a); Nw.
 12 Envtl. Advocates v. U.S. Envtl. Prot. Agency, 537 F.3d 1006, 1020 (9th Cir. 2008)
 13 (“[T]he Act categorically prohibits any discharge of pollutant from a point source without
 14 a permit.”). Congress directed the Environmental Protection Agency (“EPA”) to
 15 promulgate regulations setting limits on the pollutant discharges from three sources,
 16 including (1) point sources discharging directly into navigable waters (“direct
 17 dischargers”); (2) publicly owned treatment works (“POTWs”) treating and discharging
 18 municipal sewage or industrial wastewater; and (3) point sources discharging pollutants
 19 into POTWs rather than directly into navigable waters (“indirect dischargers”). See Nat’l
 20 Ass’n of Metal Finishers v. U.S. Envtl. Prot. Agency, 719 F.2d 624, 633 (3d Cir. 1983),
 21 rev’d on other grounds, Chem. Mfrs. Ass’n v. Natural Res. Def. Council, Inc., 470 U.S.
 22 116 (1985). Direct dischargers and POTWs are regulated through National Pollutant
 23 Discharge Elimination System (“NPDES”) permits issued to the discharger under 33
 24 U.S.C. § 1342. The effluent from indirect dischargers, such as defendant here, is subject
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1 to separate pretreatment standards designed to “prevent the discharge of any pollutant
2 through [the POTW], which pollutant interferes with, passes through or otherwise is
3 incompatible with such works.” 33 U.S.C. § 1317(b)(1).

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5 Pretreatment standards may be imposed by the EPA or an authorized state
6 or POTW: where multiple standards exist for the same pollutant, the most stringent
7 applies. 40 C.F.R. § 403.4. In Washington, the applicable pretreatment standards for
8 indirect dischargers, including numerical limitations and treatment requirements, are set
9 forth in a permit. Because the state waste discharge permit establishes the governing
10 “pretreatment standard” for purposes of the Clean Water Act, a violation of the permit is
11 a violation of 33 U.S.C. § 1317(d).

14 **B. Relevant Waste Discharge Permits**

15 Defendant’s waste discharge permit authorizes discharges from defendant’s
16 slaughterhouse to the Mount Vernon sanitary sewer and POTW under certain conditions.
17 In particular, defendant’s effluent is limited to a maximum consecutive three-day average
18 of 1430 pounds of biochemical oxygen demand (“BOD”) per day, a maximum
19 consecutive three-day average of 825 pounds of total suspended solids (“TSS”) per day,
20 and a pH between 6.0 and 11.0 standard units. It is undisputed that defendant exceeded
21 one or more of these limitations at various times throughout the limitations period.¹ The
22 permit also requires defendant to use all known, available, and reasonable methods for
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27 ¹ Plaintiff has identified 58 days on which Draper Valley exceeded its BOD limit, 76 days on
28 which the TSS limit was exceeded, and 143 days on which the pH of the effluent fell outside the
29 specified range.

1 treatment (“AKART”) to pretreat its industrial wastes and to report discharge quality
 2 information to the Washington Department of Ecology on a monthly basis.

3 The Mount Vernon POTW has its own wastewater discharge limitations.
 4 The POTW has not had any permit excursions during the relevant time frame.

6 DISCUSSION

7 A. Standing

8 In order to satisfy Article III’s standing requirements, “[a] plaintiff must
 9 allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and
 10 likely to be redressed by the requested relief. Allen v. Wright, 468 U.S. 737, 750 (1984).
 11 The “personal injury” element requires a showing that plaintiff suffered an invasion of a
 12 legally protected interest that is concrete and particularized, as well as actual or
 13 imminent. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Its purpose is to
 14 ensure that the named plaintiff was actually injured and is entitled to an adjudication of
 15 the claim asserted, not merely abstractly distressed by unfounded fears or a wrong
 16 suffered by the public at large. Friends of the Earth, Inc. v. Gaston Copper Recycling
 17 Corp., 204 F.3d 149, 154, 156 (4th Cir. 2000). The alleged injury need not be large: an
 18 actual and genuine loss, even if a trifle, will suffice for standing purposes. See, e.g., U.S.
 19 v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 689 n.14 (1973);
 20 Natural Res. Def. Council, Inc. v. U.S. Food and Drug Admin., 710 F.3d 71, 85 (2nd Cir.
 21 2013).

22 An organization like Waste Action Project “has standing to bring suit on
 23 behalf of its members when its members would otherwise have standing to sue in their
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own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc., 528 U.S. 167, 181 (2000).¹ An individual member of Waste Action Project can show a cognizable injury by establishing “that she has an aesthetic or recreational interest in a particular place, or animal, or plant species and that that interest is impaired by defendant’s conduct.” Ecological Rights Found. v. Pac. Lumber Co., 230 F.3d 1141, 1147 (9th Cir. 2000). “[T]he threshold question of citizen standing under the Clean Water Act is whether an individual can show that she has been injured in her use of a particular area because of concerns about violations of environmental laws, not whether the plaintiff can show there has been actual environmental harm.” Id. at 1151.

In this case, Doris Brevoort is a member of Waste Action Project who lives within sight of the Skagit River and utilizes the river for spiritual renewal, recreation, bird-watching, and aesthetic enjoyment. Ms. Brevoort is, however, aware that the waters of the Skagit River in and downstream of Mount Vernon are not as clean as other bodies of water in the area or even as clean as the upstream reaches of the river. While she would like to get in the water, watch birds, and enjoy the aesthetic and spiritual attributes of nature close to home, she expends time and money traveling elsewhere to engage in these activities. She also believes that, if the Skagit River were healthier near the estuary, the local fisherman from whom she buys salmon would have better catches and more to sell. Ms. Brevoort believes there is a correlation between the amount of pollutants going

¹ Defendant challenges only the first element.

1 into the Mount Vernon POTW and the amount being discharged into the Skagit River.
2 Thus, when defendant exceeds its permit limitations and sends additional pollutants to the
3 POTW, Ms. Brevoort fears that the violations result in additional pollutants being
4 discharged from the POTW over and above what would have been discharged had
5 defendant stayed within its permitted limits. Ms. Brevoort states that her concerns
6 regarding the kind and amount of pollutants discharged from the POTW and their effects
7 on the environment inhibit her use of the river and have diminished her enjoyment and
8 appreciation of the resource.
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11 Defendant argues that the alleged injuries to Ms. Brevoort's aesthetic,
12 recreational, and spiritual interests do not satisfy the standing requirement because they
13 are either unfounded or not fairly traceable to defendant's unlawful discharges.
14 Defendant argues that any fears or concerns Ms. Brevoort has about utilizing the river are
15 unreasonable because the POTW did not exceed its permit limitations at any point during
16 the relevant period. "The relevant showing for purposes of Article III standing, however,
17 is not injury to the environment but injury to the plaintiff." Laidlaw, 528 U.S. at 181.
18 Ms. Brevoort states, and defendant does not dispute, that she would like to utilize the
19 river near Mount Vernon more often and for a wider range of activities, but does not do
20 so because of the presence of pollutants. Her enjoyment of the river is diminished as a
21 result of the existence of pollution in the water even in the absence of proof that any
22 particular contaminant has reached a level at which the water is unsafe. The same
23 situation was presented in Laidlaw, where the trial court found that there was "no
24 demonstrated proof of harm to the environment" from Laidlaw's discharge of mercury in
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1 excess of its permit limitations. Nevertheless, the Supreme Court determined that
2 “environmental plaintiffs adequately allege injury in fact when they aver that they use the
3 affected area and are persons for whom the aesthetic and recreational values of the area
4 will be lessened by the challenged activity,” notwithstanding the lack of injury to the
5 environment. Id. at 183.

7 Defendant’s primary argument appears to be that Ms. Brevoort’s injuries
8 are not fairly traceable to defendant’s permit violations. Defendant argues that the expert
9 opinions of David LaLiberte and Joseph Leyda are inadmissible, leaving no evidence
10 from which a reasonable fact finder could conclude that defendant’s excessive discharges
11 resulted in an increase in pollutants finding their way into the Skagit River. The Court
12 disagrees. Regardless of whether the opinions of Messrs. LaLiberte and/or Leyda are
13 admissible, defendant’s expert, Carl Adams, testified at deposition that as much as five
14 percent of the total suspended solids in defendant’s effluent gets through the POTW and
15 is discharged into the Skagit River. Dkt. # 44-4 at 105-06. Defendant correctly points
16 out that Dr. Adams’ testimony is not entirely clear on this issue: he also testified that
17 because the fats and other suspended solids coming from Draper Valley are processed by
18 biological organisms, the bulk of the TSS in the POTW’s effluent is made up of these
19 organisms and contains an unquantifiably small amount of the TSS that was originally
20 discharged from the Draper Valley facility. Dkt. # 57-2 at 96-97 and 110-14. In either
21 case, however, the volume of TSS discharged from the POTW, whether in the form of
22 fats and other suspended solids discharged by defendant or in the form of the bacteria
23 introduced at the POTW to process those solids, increases when the volume of the
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1 influent increases. Thus, there is admissible evidence that supports Ms. Brevoort's belief
2 that when defendant exceeds its permit limitations, the effluent from the POTW contains
3 more pollutants than it otherwise would have. That being the case, the Court further
4 finds that the injuries of which Ms. Brevoort complains are fairly traceable to defendant's
5 unlawful conduct and would likely be redressed, at least in part, by a favorable decision
6 in this case. "If a plaintiff can show that his claim to relief is free from excessive
7 abstraction, undue attenuation, and unbridled speculation, the Constitution places no
8 further barriers between the plaintiff and an adjudication of his rights." Gaston Copper,
9 204 F.3d at 155. The Court therefore finds that plaintiff has established standing for
10 purposes of Article III.
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14 Plaintiff must also satisfy the statutory standing requirements for bringing a
15 citizen's suit under the Clean Water Act. The Clean Water Act authorizes any citizen to
16 commence a civil action on his own behalf against any person who is alleged to have
17 violated an effluent standard or limitation. 33 U.S.C. § 1365(a). A "citizen" is defined as
18 "a person or persons having an interest which is or may be adversely affected." 33
19 U.S.C. § 1365(g). The Supreme Court reviewed the legislative history of the Clean
20 Water Act and concluded that the statutory grant of standing is at least as broad as Article
21 III. Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 16-17
22 (1981). Thus, because plaintiff is able to prove an injury that satisfies Article III, it has
23 "an interest which is or may be adversely affected" by the alleged discharge.
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B. Violations of Permit Limitations

Defendant does not dispute the underlying records on which plaintiff bases its allegations of permit violations or plaintiff's calculations regarding the number and extent of violations. The Court therefore finds that defendant is liable under the Clean Water Act, 33 U.S.C. § 1317, for violating numeric effluent limitations for BOD, TSS, and pH contained in condition S1 of state waste discharge permit ST0003861 as follows:

Violations of Biochemical Oxygen Demand (BOD) Limit Limit: 1430 lbs/day, 3-day rolling average	
Date	Components of 3-day average BOD lbs/day
03/04/08	2274
03/05/08	1592
03/06/08	1251
3-day average	1706
08/18/09	1931
08/19/09	1551
08/20/09	1678
3-day average	1720
08/21/09	1112
3-day average	1447
08/26/09	1024
08/27/09	2001
08/28/09	1690
3-day average	1572
12/07/10	1729
12/08/10	1592
12/09/10	4329
3-day average	2550

1	12/10/10	1000
2	3-day average	2307
3	12/11/10	799
4	3-day average	2043
5		
6	12/14/10	1655
7	12/15/10	2058
8	12/16/10	1841
9	3-day average	1851
10	12/17/10	794
11	3-day average	1564
12		
13	01/25/11	1033
14	01/26/11	2383
15	01/27/11	1102
16	3-day average	1506
17	01/28/11	892
18	3-day average	1459
19		
20	02/01/11	1140
21	02/02/11	1879
22	02/03/11	1685
23	3-day average	1568
24	02/04/11	1180
25	3-day average	1581
26		
27	02/08/11	1475
28	02/09/11	1501
29	02/10/11	1549
	3-day average	1508
	02/11/11	1497
	3-day average	1516
	05/26/11	1248
	05/27/11	1560
	05/28/11	2159
	3-day average	1656

05/29/11	1540
3-day average	1753
06/14/11	1620
06/15/11	1647
06/16/11	1036
3-day average	1434
07/19/11	1520
07/20/11	1889
07/21/11	1037
3-day average	1482
07/22/11	1696
3-day average	1541
01/18/12	853
01/19/12	1652
01/20/12	1935
3-day average	1480
01/21/12	824
3-day average	1470
12/11/12	1629
12/12/12	1306
12/13/12	1371
3-day average	1435
07/16/13	1390
07/17/13	1533
07/18/13	1618
3-day average	1514
11/13/13	1655
11/14/13	1513
11/15/13	1286
3-day average	1485

12/10/13	1793
12/11/13	1232
12/12/13	1327
3-day average	1450
Total Violation Days =	58

Violations of Total Suspended Solids (TSS) Limit Limit: 825 lbs/day, 3-day rolling average	
Date	Components of 3-day average TSS lbs/day
03/03/08	62
03/04/08	1674
03/05/08	930
3-day average	889
03/06/08	671
3-day average	1092
04/28/08	42
04/29/08	1070
04/30/08	1409
3-day average	840
05/01/08	704
3-day average	1061
05/02/08	476
3-day average	863
06/19/08	430
06/20/08	1035
06/21/08	1517
3-day average	994
06/22/08	379
3-day average	977
07/15/08	987
07/16/08	1193
07/17/08	507
3-day average	896
01/02/09	97
01/03/09	1253
01/04/09	1165

3-day average	828
03/11/09	487
03/12/09	892
03/13/09	1402
3-day average	927
03/14/09	597
3-day average	964
05/27/09	740
05/28/09	1211
05/29/09	714
3-day average	888
06/09/09	665
06/10/09	1109
06/11/09	754
3-day average	843
08/17/10	414
08/18/10	1130
08/19/10	1092
3-day average	879
08/20/10	460
3-day average	894
10/12/10	1165
10/13/10	1018
10/14/10	523
3-day average	902
11/30/10	756
12/01/10	885
12/02/10	1024
3-day average	888

12/03/10	610
3-day average	840
12/07/10	851
12/08/10	1479
12/09/10	1977
3-day average	1436
12/10/10	628
3-day average	1361
12/11/10	488
3-day average	1031
01/01/11	715
01/03/11	424
01/04/11	1363
3-day average	834
02/01/11	654
02/02/11	1310
02/03/11	767
3-day average	910
02/04/11	595
3-day average	891
05/03/11	1058
05/04/11	1036
05/05/11	776
3-day average	957
05/26/11	549
05/27/11	786
05/28/11	1570
3-day average	968
05/29/11	1298
3-day average	1218

05/31/11	447
3-day average	1105
06/01/11	788
3-day average	844
05/21/12	157
05/22/12	1553
05/23/12	1108
3-day average	939
05/24/12	673
3-day average	1111
05/25/12	793
3-day average	858
05/26/12	769
05/27/12	1080
3-day average	881
05/30/12	810
05/31/12	1148
06/01/12	1154
3-day average	1037
06/02/12	621
3-day average	974
07/16/13	780
07/17/13	964
07/18/13	1166
3-day average	970
07/19/13	533
3-day average	888
Total Violation Days =	76

Violations of pH Limit Limit: Not outside the range of 6.0 to 11.0 Standard Units (S.U.)		
Date	Minimum pH (S.U.)	Maximum pH (S.U.)
3/5/2008	3.4	
3/20/2008	4.6	
12/15/2008	3.4	
12/16/2008	5.1	
1/1/2009	2.8	
6/2009	5.6	
6/25/2012	5.5	
10/8/2012	5.2	
10/9/2012	5.6	
10/19/2012	4.7	
10/24/2012	4.6	
12/4/2012	4.95	12.0
12/5/2012	3.6	
12/7/2012	5.5	
12/13/2012	5.0	
12/14/2012	3.7	
12/17/2012	5.0	
1/5/2013	4.9	
1/15/2013	4.8	
1/21/2013	4.6	
1/24/2013	4.1	
1/26/2013	3.9	12.7

1	2/1/2013	4.3	12.8
2	2/2/2013	4.4	
3	2/3/2013		11.5
4	2/5/2013	4.7	12.6
5	2/7/2013	3.9	
6	2/8/2013	4.75	
7	2/10/2013	5.1	12.9
8	2/11/2013	4.5	
9	2/12/2013	3.7	
10	2/14/2013	3.6	
11	2/15/2013	4.05	12.3
12	2/19/2013	4.95	12.55
13	2/22/2013	4.0	12.0
14	2/23/2013		13.4
15	2/26/2013	4.6	
16	2/27/2013	4.2	
17	3/6/2013	4.1	12.6
18	3/11/2012	4.9	
19	3/15/2013	4.8	
20	3/16/2013	4.4	
21	4/1/2013		11.6
22	4/15/2013	4.82	
23	4/16/2013	5.4	
24	4/17/2013	5.6	
25	4/19/2013	3.58	
26	4/20/2013	5.56	
27	5/1/2013	4.8	
28	5/2/2013	5.6	
29			

1	5/9/2013	4.0	
2	5/10/2013	4.6	
3	5/11/2013	5.6	
4	5/13/2013	2.7	
5	5/14/2013	4.8	
6	5/15/2013	5.2	11.5
7	5/16/2013		11.4
8	5/18/2013		12.6
9	5/19/2013	4.0	
10	5/26/2013	4.2	11.1
11	5/28/2013		11.2
12	5/31/2013		12.4
13	6/1/2013		12.0
14	6/2/2013		11.2
15	6/8/2013	5.8	
16	6/10/2013	5.3	12.2
17	6/11/2013	5.5	11.2
18	6/12/2013	5.8	
19	6/13/2013	5.4	
20	6/14/2013	5.9	
21	6/19/2013	5.8	
22	6/27/2013	5.0	
23	7/1/2013	2.6	12.2
24	7/2/2013	5.2	12.0
25	7/5/2013	4.0	11.6
26	7/6/2013	4.0	11.6
27	7/7/2013	2.4	
28	7/9/2013	5.7	
29			

1	7/10/2013	4.7	
2	7/11/2013	4.8	
3	7/12/2013	5.4	
4	7/13/2013	5.4	
5	7/15/2013	5.5	
6	7/19/2013	5.6	
7	7/20/2013	5.7	12.2
8	7/21/2013	4.6	
9	7/22/2013	4.4	12.0
10	7/27/2013	5.7	
11	7/30/2013	5.0	
12	7/31/2013	5.8	11.8
13	8/3/2013	4.2	
14	8/4/2013	5.4	
15	8/6/2013	5.9	
16	8/8/2013		12.0
17	8/11/2013	5.6	
18	8/28/2013	4.6	
19	11/13/2013	4.8	
20	11/26/2013	4.2	
21	12/9/2013	5.0	12.1
22	12/10/2013	5.6	
23	12/11/2013	5.7	11.2
24	12/12/2013		11.3
25	12/17/2013	5.7	
26	12/19/2013		12.0
27	12/21/2013		12.3
28	12/24/2013		11.9
29			

12/25/2013	2.4	12.4
12/26/2013	5.5	11.9
12/28/2013		11.2
12/29/2013		11.8
12/30/2013		
12/31/2013		11.5
1/3/2014		12.4
1/4/2014		11.1
1/5/2015		11.2
1/6/2014		11.9
1/11/2014	4.7	12.3
1/12/2014		12.2
1/22/2014	4.1	
1/30/2014	5.9	
Total Violation Days = 143		

C. AKART Requirement

Defendant's state waste discharge permit requires it to "treat all industrial wastes containing pollutants by using all known, available, and reasonable methods for treatment prior to discharge to the sanitary sewer." Dkt. # 44-1, § S4.C.5. Plaintiff seeks a determination that, as of October 23, 2012 (the date on which the complaint in this case was filed), defendant was in violation of this permit requirement. Plaintiff's evidence consists of (1) the undisputed fact that defendant's then-existing dissolved air flotation ("DAF") system had failed to prevent numerous discharges in excess of the numeric

1 permit limitations; (2) other poultry processing facilities, including nine out of ten
2 facilities owned by defendant's grandparent company that discharged to POTWs, utilized
3 equalization tanks as part of their pretreatment systems; (3) one food processing facility
4 and a number of chemical facilities utilized flocculation chambers in their pretreatment
5 systems; and (4) defendant installed both an equalization tank and a flocculation chamber
6 in December 2013. Defendant argues that Washington's Department of Ecology
7 ("DOE") found that its DAF system satisfied the AKART requirement when it reissued
8 the permit on September 30, 2010, and that plaintiffs cannot challenge that determination
9 in the context of this suit.

12 RCW 90.48.520 requires DOE to review a permit applicant's "operations
13 and incorporate permit conditions which require all known, available, and reasonable
14 methods to control toxicants in the applicant's wastewater." DOE incorporated just such
15 a requirement in defendant's 2010 permit. In an accompanying "Fact Sheet," DOE
16 provided an explanation of its permit decisions. With regards to the AKART provision,
17 DOE stated that it would not impose any "specific limitations based on AKART criteria,"
18 but that it "considers the performance of [defendant's] DAF system to be consistent with
19 AKART requirements." Dkt. # 53-7 at 3. Defendant argues that this statement
20 conclusively establishes its compliance with the permit's AKART requirement. Plaintiff
21 argues that the quoted statements are inadmissible as undisclosed expert opinion or
22 hearsay. Neither argument is persuasive.

27 The AKART requirement is "clearly meant to foster the use of new
28 emission control technology" in the hopes of someday "extinguish[ing] sources of water
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1 quality degradation.” Puget Soundkeeper Alliance v. Washington Dep’t. of Ecology, 102
2 Wn. App. 783, 789, 792 (2000). Defendant’s argument that a statement in the “Fact
3 Sheet” should trump the express permit requirement that defendant use “all known,
4 available, and reasonable” treatment methods is factually and legally unsupported. There
5 is no indication that DOE intended that defendant use the “Fact Sheet” as a shield against
6 any technological upgrades that became available during the permit’s five year term. Nor
7 is it clear that DOE would have the power to do so: a preemptive declaration of AKART
8 compliance, notwithstanding changes in the permittee’s operations or the availability of
9 new technologies, would thwart the legislature’s express command in RCW 90.48.520
10 and, in fact, the express requirements of the permit.

14 The “Fact Sheet” is not meaningless, however. One could argue that, at
15 least as of September 30, 2010, DOE believed that defendant’s DAF system satisfied the
16 AKART requirement. While such a finding would not bind plaintiff or the fact finder in
17 this litigation (Ass’n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., 299
18 F.3d 1007, 1012 (9th Cir. 2002) (“[N]either the text of the Act nor its legislative history
19 expressly grants to the EPA or [an authorized] state agency the exclusive authority to
20 decide whether the release of a substance into the waters of the United States violates the
21 Clean Water Act.”); Sierra Club v. Portland Gen. Elec. Co., 663 F. Supp.2d 983, 997 (D.
22 Or. 2009) (“The citizen suit provisions in both [the Clean Water Act and the Clean Air
23 Act] are nearly identical, and grant citizens the right to challenge the actions of
24 companies alleged to be in violation of the law, regardless of whether the government
25 believes them to be in violation of the law.”)), it is evidence that weighs in favor of
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1 defendant on the AKART claim. Plaintiff's objections to the admissibility of the "Fact
2 Sheet" are overruled. The "Fact Sheet" is not subject to the disclosure requirements of
3 Fed. R. Civ. P. 26(a)(2): it is not an expert witness, nor was the person(s) who created it
4 "retained or specially employed to provide expert testimony in the case." With regards to
5 the hearsay objection, the "Fact Sheet" is a "record or statement of a public office" which
6 sets out factual findings following a legally authorized application and review process
7 under Fed. R. Ev. 803(8). Plaintiff is free to argue that the investigation and review of
8 defendant's wastewater treatment system was cursory, that the statement is ambiguous,
9 and/or other factors that might reduce the weight given the statement (see Sullivan v.
10 Dollar Tree Stores, Inc., 623 F.3d 770, 778 (9th Cir. 2010)), but the Court finds that the
11 source of the "Fact Sheet" and the context in which it was created are sufficient
12 indications of trustworthiness to warrant its admission into evidence.
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14 The question, then, is whether either party has shown that it is entitled to
15 summary adjudication on the AKART claim. Determining whether defendant utilized
16 "all known, available, and reasonable methods" to treat its wastewater throughout the
17 limitations period will require consideration of available technologies, their application in
18 the food processing industry, and the financial and operational burdens of adoption. The
19 state legislature has made clear that the goal of ensuring the purity of the waters of the
20 state must be pursued in a way that is consistent with not only public health and wildlife
21 protection, but also "industrial development of the state." RCW 90.48.010. The mere
22 availability of certain technology in the marketplace cannot be the only consideration:
23 the technology may not be compatible with existing operations, it may be cost
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1 prohibitive, or the benefits of adoption may be so minimal that it would not be
2 reasonable.² Nor does the fact that defendant adopted existing technology in December
3 2013 establish as a matter of law that the balance of competing factors made the
4 technology “known, available, and reasonable” as of October 23, 2012. While
5 defendant’s repeated permit violations between September 30, 2010, and the date this
6 action was filed suggest that the need to adopt better technologies despite the financial
7 burdens was fast becoming apparent, when, exactly, the utilization of an equalization
8 tank and flocculation chamber became not only “known” and “available” but
9 “reasonable” cannot be ascertained as a matter of law. The Court finds that there is a
10 genuine issue of fact regarding if and when defendant violated the AKART requirement.

14 **D. Notice of Intent to Sue**

15 On August 13, 2012, plaintiff sent a Notice of Intent to Sue, as required by
16 33 U.S.C. § 1365(b). The notice advised “Draper Valley Holdings LLC dba Draper
17 Valley Farms” that plaintiff intended to file a citizen’s suit against “Draper Valley Farms,
18 Inc.,” under the Clean Water Act. Dkt. # 47-1. Suit was subsequently filed against
19 Draper Valley Holdings LLC dba Draper Valley Farms. Defendant argues that the
20 insertion of “Inc.” in the notice made it impossible for the recipient to identify “the
21 person or persons responsible for the alleged violation.” 40 C.F.R. § 135.3. This
22 argument is not well-taken. Taken in the context of the remainder of the notice,
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27 ² Two years before this suit was filed, the regulatory agency charged with evaluating
28 defendant’s system in the context of the Clean Water Act’s permitting scheme arguably decided
29 that the DAF system struck the appropriate balance between environmental protection and
industrial development.

1 defendant could not possibly have been confused about the identity of the alleged
2 polluter: plaintiff clearly identified the relevant permit number (which identified Draper
3 Valley Farms, Inc, as the permittee), the location of the slaughterhouse facility, and the
4 dates on which violations were alleged to occur. Although the record shows that
5 defendant used at least three names while operating the Mount Vernon facility, there is
6 no indication that, upon receipt of the Notice of Intent to Sue, it was in any way confused
7 regarding the identity of the entity responsible for the alleged violations. The notice
8 provided on August 13, 2012, was sufficient.
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13 For all of the foregoing reasons, plaintiff's motion for summary judgment
14 (Dkt. # 41) is GRANTED in part and DENIED in part. Defendant's motion for summary
15 judgment (Dkt. # 49) is DENIED.
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18 Dated this 22nd day of April, 2014.
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21 HONORABLE ROBERT S. LASNIK
22 UNITED STATES DISTRICT JUDGE
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